SUPREME COURT, U. S.

FEB 20 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1073

PEARL KOZAK,

Petitioner,

vs.

MORRIS KOZAK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT.

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PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT.

Petitioner, Pearl Kozak, prays that a Writ of Certiorari issue to review the judgments of the Illinois Supreme Court and of the Appellate Court of Illinois, First District, Second Division, entered on November 20, 1968 and on August 16, 1968, respectively.

OPINIONS BELOW.

The abstract opinion of the Appellate Court of Illinois, First District, Second Division is reported at ..... Ill. App. 2d ....., 240 N. E. 2d 155 (1968).

JURISDICTION.

The judgment of the Illinois Supreme Court denying Petitioner's Petition for Leave to Appeal was made and entered on November 20, 1968. The judgment of the Appel-

late Court of Illinois, First District, Second Division was made and entered on August 6, 1968. Rehearing was denied on September 9, 1968. Copies thereof are appended to this petition in the Appendix at pp. 15-30. The jurisdiction of this Court is invoked under 28 USC Sec. 1257.

QUESTIONS PRESENTED.

1. Whether the master in chancery denied Petitioner's Constitutional right to procedural due process and a fair and impartial trial by hearing the greater portion of the evidence submitted in this case and by concluding the hearings before him on September 22 and 23, 1966 at a time when Petitioner was trying to find a lawyer to represent her and was without the representation of any attorney?

2. Whether the master in chancery denied Petitioner's Constitutional right to procedural due process and a fair and impartial trial by failing to continue the conclusion of such hearings until Petitioner had been given a reasonable and adequate opportunity under the facts and circumstances of this case to secure an attorney to represent her?

3. Whether the master in chancery denied Petitioner's Constitutional right to procedural due process and a fair and impartial trial by stating to Petitioner before all the proofs were closed in this case that she was going to lose the case better than a lawyer could?

4. Whether the master in chancery denied Petitioner's Constitutional right to procedural due process and a fair and impartial trial by failing to advise her that his report was only a proposed or tentative report and by failing to advise her of the legal consequences should she fail to file objections to his report?

CONSTITUTIONAL PROVISION INVOLVED.

The Constitutional provision involved is the portion of the Fourteenth Amendment to the U. S. Constitution which reads as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ." (17 U. S. Supreme Court Digest, Law. Ed., p. 948).

STATEMENT.

Although certain pre-trial matters were still pending, the lower trial court referred the case to master in chancery Mayer Goldberg by order entered November 22, 1965. (R. C56) Such order directed that the hearings commence before the master prior to December 1, 1965. This Court can take judicial notice of the fact that such reference was made on November 22, 1965, so that a hearing could be commenced by the master prior to the expiration of his term of office.

On November 30, 1965, a short hearing was held before the master, at which time Respondent's attorney stated that it was difficult for him to proceed at that time because of a certain pre-trial motion which was still pending before the court. (M. Tr. 3) At this first hearing before the master, Petitioner was represented by the firm of McCarthy and Levin and had been represented by such firm in this case since February 23, 1965. (R. C27)

On February 2, 1966, an order was entered by the lower trial court granting McCarthy and Levin leave to withdraw as attorneys of record for Petitioner. (R. C58) She then proceeded to search for a new lawyer. The record shows that she consulted at least two Chicago, Illinois firms; viz., Winston, Strawn, Smith & Patterson and McDermott, Will & Emery. (M. Tr. 84) After several unsuccessful attempts

to secure a lawyer to take her cause, Petitioner finally succeeded in employing Mr. James E. S. Baker of Sidley, Austin, Burgess & Smith as her attorney, and such firm was given leave to appear as her attorneys in this case by order dated April 6, 1966. (R. C60)

On April 28, 1966, a second hearing was held before the master, at which time Petitioner was represented by the firm of Sidley, Austin, Burgess & Smith. Between April 28, 1966 and August 22, 1966, the date of the next recorded hearing before the master, no formal hearings were held because of certain prior commitments of the attorneys for both parties and because of certain settlement negotiations between the parties which took place during this period of time with the knowledge and active participation of the master. (M. Tr. 82-83)

On August 7, 1966, Petitioner sent a telegram to Mr. Baker, terminating his services as her attorney. Mr. Baker did not immediately seek leave to withdraw as Petitioner's attorney of record but sought a reconciliation with Petitioner. (M. Tr. 80-81)

On August 22, 1966, a third hearing was held before the master, at which time Mr. Allison of Sidley, Austin, Burgess & Smith appeared. At this hearing, the master was advised that Petitioner had discharged Sidley, Austin, Burgess & Smith as her attorneys. The master stated that "Mrs. Kozak has an absolute right to discharge her attorney at any time." (M. Tr. 76) Petitioner asked Mr. Allison for the return of her files; and at the conclusion of such hearing, Mr. Allison and Petitioner proceeded to the offices of Sidley, Austin, Burgess & Smith, and she secured the return of her file. (M. Tr. 88) In response to the master's question whether Petitioner was ready to proceed that morning, Petitioner stated that she was not ready inasmuch as she did not have a new lawyer. (M.

Tr. 77) When the master asked her how long it would take her to get a new lawyer, Petitioner explained to the master that for 4½ years she had engaged one lawyer after another, and the opposition had interfered with her right to get adequate defense. (M. Tr. 77) Petitioner promised that as soon as Sidley, Austin, Burgess & Smith formally withdrew as her attorneys of record and she got her file back, she would be on the hunt again for a new lawyer and would endeavor to get a lawyer as soon as possible. (M. Tr. 78, 81) Thus, the master was fully apprised of the undisputed fact that Petitioner had had many lawyers in this case and that because of this fact, she was having more and more difficulty in finding a lawyer who would take her case. (M. Tr. 79, 84) Mr. Allison then suggested that the case be continued until the middle of September and then perhaps by that time Petitioner would have a new attorney or she would work this out with her present attorneys. (M. Tr. 81) The master stated that all he cared about was that the case would be expeditiously heard. (M. Tr. 82) The master finally decided that because Petitioner's lawyer would need time to familiarize himself with the case, he set the case for hearing on September 7, 1966 and ordered Petitioner to bring in her new lawyer and then to arrange a firm schedule for completing the case. (M. Tr. 87)

On September 7, 1966, a fourth hearing was held before the master, at which time the law firm of Lansing and Kaplan appeared as prospective attorneys for Petitioner, although they had not yet been formally retained and had not yet decided whether they wanted to represent Petitioner in this case. (M. Tr. 90) On the same date, an order was entered by the lower trial court granting Sidley, Austin, Burgess & Smith leave to withdraw as attorneys of record for Petitioner. (R. C65) On the advice of Mr. Lansing, Petitioner did not personally appear at this fourth hearing before the master. (M. Tr. 90) After discussion

was held off the record, the case was set for hearing on September 22 and September 23, 1966. The master added that "Proofs will be closed on September 23 and if Mrs. Kozak does not have a lawyer by that time, she will just have to act pro se as far as I am concerned". (M. Tr. 92)

On September 22, 1966, a fifth hearing was held before the master, at which time Petitioner appeared and advised the master that Mr. Lansing would not take her case unless she agreed to accept compulsory arbitration and that she would not agree to compulsory arbitration. (M. Tr. 94) Despite the fact that the master knew that Petitioner had been represented by 3 different lawyers in this case up to that time, that she had made a good faith effort to secure a lawyer, viz., Mr. Lansing, which lawyer did appear at the September 7, 1966 hearing, that she had advised the master as to the reason why Mr. Lansing would not take her case, that the master knew or should have known that Petitioner not only desired but needed to be represented by counsel in this case, the master in effect forced Petitioner to proceed to try the case as her own attorney. (M. Tr. 95-96)

In his report, the master found that the "Lack of legal representation by defendant has caused the unusual and regrettable condition of the record presented to the Court with this report". (R. C75) At the August 22, 1966 hearing Petitioner asked the master how she was going to get a lawyer, referring in her own language to the problem she had been having in getting a lawyer to represent her because of the fact that she had had several previous lawyers represent her in this case. (M. Tr. 79) The master replied that that was not his problem nor the problem of the Court and that his only problem was to try the case expeditiously. (M. Tr. 79)

After the final hearings commenced on September 22 and 23, 1966, Respondent's attorney was in such a hurry to get done, apparently before Petitioner could get a new lawyer,

that after resting his case in chief on September 22, 1966, he requested leave to reopen his case on the morning of September 23, 1966 after reviewing his notes the evening before and discovering "that there were some areas that I did not cover in my zeal to get through quickly". (M. Tr. 228)

As the two day hearing progressed, it became painfully evident to everyone that Petitioner was not a lawyer and needed one in order to obtain a fair and impartial trial. For example, at one point, after Respondent's counsel asked a question, the master observed that if Petitioner had a lawyer, the lawyer would have objected to that question. (M. Tr. 176) At another point in the proceeding, the master told Petitioner not to argue the case but to ask a question. Petitioner replied that she was not a lawyer and the master stated "That is very evident". (M. Tr. 204)

At another point in the proceedings, the master told Petitioner that "you are going to lose the case better than a lawyer could". (M. Tr. 298)

The hearings before the master were concluded on September 23, 1966. (M. Tr. 338) On or about November 10, 1966, the master prepared his report, a copy of which was served upon Petitioner a few days later. (R. C112) The copy of such report served upon Petitioner failed to state on its face that it was only a proposed or tentative report. At no time did the master in chancery ever advise Petitioner of the legal consequences to her should she fail to file objections to this report.

Despite her efforts to secure adequate counsel, Petitioner was unable to secure a lawyer to represent her until the time to file such objections had expired. Due to a controversy over certain prior conditions set by the lower trial court to its vacation of the final decree entered in this case, such decree was never vacated and no objections to the master's report or exceptions to the chancellor's final

decree were ever filed by Petitioner. Consequently, the federal Constitutional questions raised by this Petition were raised first in the Petitioner's brief to the Appellate Court of Illinois, First District, Second Division. The Appellate Court found such contentions to be without merit at pages 8-9 and 10-11 of its opinion, see Appendix at pp. 22-24. Such questions were raised again by Petitioner in her Petition for Leave to Appeal to the Supreme Court of Illinois, pp. 9-11; and on November 20, 1968, the Illinois Supreme Court summarily denied Petitioner's Petition without issuing any written opinion thereon.

Petitioner contends that the federal Constitutional questions presented in this Petition were timely and properly raised in the Illinois state courts so as to give this Court jurisdiction to review the Illinois state court judgments on Writ of Certiorari.

REASONS FOR GRANTING THE WRIT.

In finding Petitioner's Constitutional questions concerning the conduct of the master in chancery to be without merit, the Illinois state courts have decided a federal question of substance not heretofore determined by this Court, to the best knowledge of the writer of this Petition. Therefore, under Rule 19(a) of this Court's Rules, there is a valid reason for this Court to grant a Writ of Certiorari in this case.

In state prosecutions of an accused for a crime, the Fourteenth Amendment's guaranty of due process includes not only the right to have an attorney appointed by the state in certain cases, but also the right of an accused to a fair opportunity to secure counsel of his own choice. *Crooker* v. *California,* 357 U. S. 433, 2 L. ed. 2d 1448 (1958).

A necessary corollary to an accused's right to be represented by counsel is that he must be given a reasonable

opportunity to employ and consult with counsel; otherwise his right to be heard through counsel would be of little worth. *Chandler* v. *Fretag,* 348 U. S. 3, 99 L. ed. (1954).

The due process clause has been held to invalidate a state court conviction where an unrepresented accused did not intelligently and understandingly waive the benefit of counsel and where the circumstances showed that his rights could not have been fairly protected without counsel. *Pennsylvania ex rel. Herman* v. *Clandy,* 350 U. S. 116, 100 L. ed. 126 (1956).

The same Constitutional principles should apply to a civil case where the defendant wants a lawyer to represent her but is denied an adequate and reasonable opportunity to secure one.

A line of cases involving deportation of aliens hold that an alien is entitled to procedural due process including a fair hearing. Such non-criminal proceedings have been held constitutionally defective where the alien was denied counsel even though the right to counsel secured by the Sixth Amendment relates only to criminal prosecutions. See *Ex parte Chin Loy You,* 223 F. 833 (1915, DC Mass.); *United States ex rel. Castro-Louzan* v. *Zimmerman,* 94 F. Supp. 22 (1950, DC Pa.); *Roux* v. *Commissioner of Immigration,* 203 F. 413 (1913, CA 9th Cal.); *Hyun* v. *Landon,* 219 F. 2d 404 (1955 CA 9th Cal.), aff'd by an equally divided court 350 U. S. 990, L. ed. 856, reh. den. 351 U. S. 928, 100 L. ed. 1457.

In the last case, this Court, after pointing out that an alien in deportation proceedings was entitled, under established law, to due process of law, including a fair hearing, said that "indispensable" to a fair hearing are reasonable notice, the right to examine witnesses and to testify and to present witnesses and "to be represented by counsel".

The Federal guaranty of due process extends to state

action through the judicial as well as through the legislative or executive branch of the government. *Brinkerhoff-Fariz Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 74 L. ed. 1107 (1930).

A person's right to reasonable notice of a charge against him and an opportunity to be heard in his defense are basic, and such rights include, as a minimum, a right to examine witnesses against him, to offer testimony and to be represented by counsel. *In re Oliver,* 333 U. S. 257, 92 L. ed. 682 (1948).

The Appellate Court misapprehended the significance of the fact that Petitioner was represented by or had consulted with 8 different sets of attorneys in this cause. See Appendix, p. 23. First, we submit such fact conclusively proves that Petitioner wanted a lawyer to represent her in this situation or else why did she consult with so many different sets of attorneys?

Second, it is undisputed that such fact was well known to the master and that such fact by itself would make it very difficult for Petitioner to secure a new lawyer in this situation. The master knew or should have known that every time Petitioner went to consult with a new lawyer for the purpose of employing new counsel, she had to explain and reexplain why she had had so many different lawyers in the past. This Court can take judicial notice that lawyers are suspicious of any prospective client with such a past history. In a jurisdiction where the average delay for trial in a personal injury case is 5 or 6 years, the fact that this matter had been pending in the chancery court for almost three years is not too shocking when compared to the law jury calendar.

Sidley, Austin, Burgess & Smith were given leave to withdraw as Petitioner's attorneys on September 7, 1966. (R. C65) On the same date, the law firm of Lansing & Kaplan appeared before the master as prospective attor-

neys. (M. Tr. 90). On September 22, 1966, Petitioner appeared at the next master's hearing and advised the master that the law firm of Lansing & Kaplan would not take her case because she refused to submit to compulsory arbitration. (M. Tr. 94)

Except for a short hearing on November 30, 1965 in order to start the hearings before the master's term of office expired and except for one session on April 28, 1966, all the rest of the evidence and testimony in this case was submitted during four sessions on September 22 and 23, 1966 at a time when Petitioner had no lawyer and was in effect forced to present her entire case *pro se*. The master gave her no other choice but to represent herself or let the matter go by default.

It is not Petitioner's contention that the master should have refused to proceed with the hearing until she had obtained a lawyer. Rather it is Petitioner's position that because of her state of mind, the complexity of the issues in this law suit, and the difficulty which she had to secure new counsel in the past, all of which facts were well known to the master, the master knew or should have known that she needed sufficient and adequate time to get new counsel and that his failure to give her such time and his insistence that the greater bulk of the hearing be held on two days, resulted in effect in forcing her to try the case *pro se*.

It is an obvious fact that most lawyers know better than to act as their own attorneys when they are parties to a law suit. It is well known that their own personal emotions interfere and prevent them from giving themselves wise and judicious advice. It was evident to the master that Petitioner was not a lawyer. It also was or should have been evident to the master that the personal animosities between the parties made it totally impossible for Petitioner to act as her own attorney and still obtain a fair trial. The master had complete control of the proceedings.

In order to insure a fair and impartial trial, he should have refused to complete the hearings until Petitioner had been given an adequate and reasonable opportunity to secure a new lawyer. She was not given that opportunity, and, therefore, she was denied procedural due process of law.

Added to the foregoing is the master's statement before all the evidence was in that Petitioner was going to lose the case better than a lawyer could. (M. Tr. 298)

The Petitioner and Respondent in this case are first cousins. (R. C75) On September 12, 1949, they were married by an Orthodox Jewish Rabbi. (R. C75) Earlier the parties appeared before the County Clerk of Cook County, Illinois, and both executed the prescribed form of Affidavit for a marriage license. (R. C76) In response to questions asked both in the printed form of Affidavit and by the Clerk orally, each of them severally stated under oath that they were "not blood relatives" and that they were "not prohibited from intermarrying by the laws of the jurisdiction" where they resided. (R. C76; Deft. Ex. 1; M. Tr. 147) The master in chancery expressly found in his written report that such affidavit was "patently false" and was a "deliberate deception" by both parties in order to obtain their marriage license. (R. C76-77) On September 25, 1957, Respondent gave Petitioner a stock certificate representing 49% of the outstanding stock of his privately held corporation, Advance Neon Signs, Inc. The sole issue before the master was whether or not such gift was made under a mutual mistake of law and fact by the parties regarding the legality of their marriage. During the course of the final two day hearing, the master ruled orally (M. Tr. 185):

> "*There is no mistake of fact here.* He knew they were first cousins. He didn't know that it was invalid *which he should have known,* which he is presumed to know." (Emphasis added.)

It is significant that in his written report the master inconsistently found a mutual mistake of law and fact regarding the legality of the marriage insofar as the gift of stock in 1957 is concerned.

Rule 9.2(a) of the Rules of the Circuit Court of Cook County, Illinois (Ill. Rev. Stat. 1965, Ch. 110, 309.2(a)), then in force, required the master to serve upon the parties a "draft of his *proposed* report". Rule 9.3(c) states that within 30 days after the expiration of the time for filing objections, the master shall prepare and file with the clerk his final report. Likewise, in *Decatur Coal Co.* v. *Clokey*, the Illinois Supreme Court says that the "*orderly* procedure" required by equity practice is for the master to first serve a "*tentative* report" of his findings upon the parties' attorneys, 163 N. E. at 704. The master failed to follow this "*orderly*" procedure in that he failed to notify all parties that the report he served upon them was only a "*proposed*" or "*tentative*" report (R. C94). Instead, the master prepared and served upon the parties a final report insofar as the notice to the parties is concerned. If the master had followed such Rules and notified Petitioner that his report was only a proposed or tentative report, she may have had good reason to believe that filing objections would have accomplished something. Not being a lawyer but still engaged in an unsuccessful effort to secure a lawyer and, therefore, not being advised properly, Petitioner was unable to properly evaluate the situation.

The record is completely devoid of any explanation by the master to Petitioner of the possible consequences to her if she failed to file objections with him to his report. The master knew that Petitioner was not a lawyer. (M. Tr. 204) He knew or should have known that she had no idea of the importance of objections in the master in chancery procedure. He knew or should have known that she was having great difficulty in securing a new lawyer to handle her case

because of her prior record of having more than one lawyer in the case. He knew that she felt that the opposition was interfering with her right to get a lawyer to represent her. Despite these undisputed facts, the master failed to fully explain to her her rights in connection with his proposed report. Such failure denied Petitioner a fair and impartial trial.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

MORRIS KOZAK, *Plaintiff-Appellee,* *vs.* PEARL KOZAK, *Defendant-Appellant.*	Appeal from the Circuit Court of Cook County, Chancery-Divorce Division. Honorable Cornelius J. Harrington, Judge Presiding.

MR. JUSTICE LYONS Delivered the Opinion of the Court.

The plaintiff, Morris Kozak, filed a two count complaint in equity naming Pearl Kozak as the defendant. In Count I the plaintiff sought the severance of numerous assets held in joint tenancy and accumulated during their relationship with the funds of both parties. In Count II the plaintiff sought the rescission of an inter vivos gift on the basis of a mutual mistake of fact and law. After ruling on motions testing the legal sufficiency of the complaint and certain portions of the answer, the chancellor referred the cause to a master in chancery for the taking and reporting of testimony. In addition, the master was to report his conclusions of law and fact therein. Extensive hearings were held before the master. In the final days of testimony, the defendant appeared pro se, having discharged her earlier attorneys.

Regarding Count I of the complaint, the master's report found for the defendant, holding that the joint tenancy assets accumulated during their relationship with joint funds were to be severed in equal proportions, and not in proportion to the respective contributions of the parties,

as sought by plaintiff. This finding was adopted by the chancellor in his subsequent decree. No appeal is taken from this portion of the decree.

The defendant appeals, however, from that portion of the decree adopting the master's report in decreeing that the inter vivos gift was rescinded due to a mutual mistake of fact and law. The gift so rescinded involved the transfer of the minority interest in the plaintiff's closely-held corporation, Advance Neon Signs, Inc. The defendant also appeals from three orders entered by the chancellor in various stages of this extended litigation: (1) the order granting the motion of the plaintiff to strike various portions of the defendant's answer which included, inter alia, the defense of in pari delicto; (2) the order denying the defendant's verified petition which sought to modify an earlier order of the trial court which required her to deposit with the clerk of the court 34% of her 50% share of joint tenancy assets as a prior condition to vacating the decree, thereby allowing her to file exceptions to master's report in lieu of objections; (3) the order denying defendant's verified petition to vacate the decree.

Initially, it should be stated that the instant case solely concerns itself with the ownership of a single stock certificate containing 73 shares of Advance Neon Sign, Inc. common stock. This certificate represents a 49% minority interest in the corporation which is otherwise controlled by the plaintiff. He is the president and principal operator of said corporation, organizing it in 1936. Both parties to this litigation are in their sixties.

The complaint alleges that in 1949 the parties to this lawsuit went through a purported marriage ceremony wherein the defendant took the name of and since has been known as Pearl Kozak. This marriage was annulled by decree in 1963. In 1957 the defendant complained to the

plaintiff that she had no interest in Advance Neon Signs, Inc. and represented to him that if she were in fact his wife, she would be "a partner" in all of his assets and should be entitled to an almost equal participation in said corporation. Moreover, if the parties were to continue as man and wife, plaintiff should convey to defendant 49% of the stock ownership in said corporation. Continuing, the complaint alleged that at that time (i.e., 1957) both plaintiff and defendant were laboring under a mistake of fact and law that they were husband and wife. The husband, in an effort to maintain the marriage relationship, which both parties assumed existed, caused one stock certificate for 73 shares in said corporation to issue in defendant's name. The complaint further alleges that although the plaintiff has demanded that said certificate be returned for cancellation and for issuance of a new stock certificate to himself, the defendant has failed and refused to deliver it.

In his prayer for relief, plaintiff asks that the court enter a decree finding that defendant has no title to or interest in said stock certificate and finding further that said stock certificate was delivered to defendant under a mutual mistake of fact and law. The prayer also requests that the court order should then order the defendant to deliver said stock certificate, properly endorsed, to plaintiff or to the corporate secretary for transfer to plaintiff.

Almost a year after the above complaint was filed, the defendant filed her motion to dismiss the complaint, alleging, inter alia, the defense of in pari delicto. After a hearing, defendant's motion to dismiss was denied and she was ordered to answer. In her answer, the defendant stated that both parties knew that they were first cousins and that their marriage violated the statutes of Illinois at the time of their marriage in 1949 and during their subsequent life together. She admitted that in 1957 she called plaintiff's attention to the fact that she had no

interest in said corporation and if the parties were to continue their relationship, they should share equally in the stock of that company. Continuing, she denied that at the time of the gift the parties were laboring under a mistake of fact or law that they were husband and wife and denied that any such mistake was a cause for the issuance or delivery of the certificate now in controversy. She stated that in fact the plaintiff had a free choice in regard to this gift.

The answer denied other allegations in the complaint and renewed the defense of in pari delicto. Pursuant to plaintiff's motion to strike portions of defendant's answer, the court, after argument, ordered that the in pari delicto defense, which had been mentioned earlier in defendant's motion to dismiss the complaint and which defense she had renewed in her pleading, would now be stricken from her answer. The parties then proceeded to the master in chancery for the taking of evidence.

During the hearings before the master, the defendant changed attorneys of record twice before finally proceeding pro se in the final two days of the hearings. The record contains assertions by the defendant that the attorneys for the plaintiff had kept her from getting any legal representation as the attorneys she saw were allegedly influenced by what the plaintiff's lawyers conveyed to them. This was vigorously denied by the attorneys for the plaintiff. The hearings disclosed that the parties to this lawsuit are first cousins to each other. In 1949 they went through a marriage ceremony conducted by an Orthodox rabbi in Chicago. Marriages between first counsins are valid under the religious tenets of these parties, Orthodox Judaism. However, under Illinois statutory law, as then existing and as presently existing, marriages between first counsins are void. See Ill. Rev. Stat. (1967), ch. 89, sec. 1.

In the affidavit for marriage license signed by both parties to this litigation, they declared under oath that they were not blood relatives. This affidavit was introduced into evidence by the defendant to show there was no mutual mistake of fact in 1949. The defendant testified that both parties knew the marriage was illegal under Illinois law, but felt that the marriage was valid because of the attitude of Orthodox Judaism regarding first cousin marriages. The plaintiff testified that he believed the marriage was legal because it was performed by an Orthodox rabbi. He also stated that in 1949 he did not know marriages between first cousins were void in Illinois. He first learned of this in 1963 and immediately filed for an annulment.

Regarding the first of stock presently in controversy, the defendant stated that in the summer of 1957 she learned for the first time through a chance remark made by Sylvia Kozak, plaintiff's sister, that Sylvia owned shares in the plaintiff's corporation. Defendant then requested equal participation in the corporate stock of the company, if the parties were to continue their relationship. When plaintiff allegedly delayed in complying with this request, defendant left a note in their apartment which stated in effect that either the parties share equaliy or they terminate the relationship as husband and wife. Defendant then went on to testify that plaintiff had freedom of choice in the matter. The following day plaintiff had the certificate transferred from his sister to defendant. Before proofs were closed, plaintiff testified that he executed this inter vivos gift to preserve a marriage which he thought was valid at the time.

The master's findings of fact and recommendations which are material to this appeal and which were adopted by the chancellor in his decree as as follows:

> 31. In the opinion of the master, this affidavit convinces that the parties knew that there was a serious question about their right to marry, because both of

them engaged in a deliberate deception to obtain their marriage license. However, neither of them obtained proper legal advice; and, therefore, there is some doubt in the record as to whether either of them actually knew that their purported marriage was entirely void. It is plain that neither of the parties, at the time of the ceremony, understood fully and clearly all of the legal consequences of their conduct and of their attempted marriage. On the contrary, they both believed that their marriage by the Orthodox rabbi was valid, as evidenced by their future conduct. This appears from plaintiff's testimony and defendant's verified answer.

32. As above pointed out, in another section of this report, defendant attempted to rely upon these circumstances as a defense of *pari delicto*. However, the court has stricken this defense on motion of plaintiff. In addition, the master has concluded independently that the defense of *pari delicto* is not applicable here and cannot be relied upon by the defendant.

* * * * *

56. It is undisputed that defendant made no financial contribution of any kind to this company, nor did she render any services in connection therewith. The company was managed and operated by plaintiff almost exclusively with the assistance of his sister.

* * * * *

59. Plaintiff testified positively and directly that he caused the stock to be transferred to defendant only because of his mistaken belief that the parties were lawfully married. Upon review of the authorities cited by plaintiff's counsel, the master is of the opinion that this testimony is competent evidence. In addition, defendant herself, testified that the stock was given to her by plaintiff only by way of submission to her demands and in an effort to save what both of the parties thought had some validity as a marriage relationship. Although the parties both may have had initial doubts about the effect of their blood relationship upon the marriage, the master is of the opinion that, by the time of the transfer of the Advance Neon

Stock to defendant, both of the parties were motivated by a desire to preserve their status and relationship, which both of them had come to accept as valid and binding.

* * * * *

61. The master finds that the stock was issued to defendant by plaintiff as a result of plaintiff's mistake of intermingled law and fact regarding the validity of his purported marriage to defendant and as a result of plaintiff's desire to perpetuate a relationship and a status which in fact and in law did not actually exist. The master further finds that defendant acted under the same mistake when she demanded issuance of the stock to her. In the opinion of the master, these mistakes require correction by this court.

62. The master accordingly finds and concludes that, in this portion of the matter, the equities are with plaintiff and that plaintiff is entitled to a return to him from defendant of the 73 shares of stock in Advance Neon Signs, Inc., . . . It is, accordingly, recommended that a decree be entered herein requiring defendant to endorse said certificate of stock and to deliver same to plaintiff as his sole property. . . .

* * * * *

On appeal, the defendant contends, inter alia: (1) the lower court committed reversible error by incorrectly striking the defendant's pari delicto defense from her answer; (2) the master engaged in certain improper and prejudicial conduct which denied defendant a fair and impartial trial; (3) certain paragraphs of the decree material to the appeal are invalid because contrary to the manifest weight of the evidence; (4) the lower court committed reversible error by its orders refusing to vacate the final decree and refusing to modify the portion of an earlier court order requiring the defendant to deposit 34% of her 50% share of joint tenancy assets as a prior condition to the vacation of the earlier final decree.

In the view which we take of this case, defendant's pari

delicto defense would not aid her. In equity cases, such a defense is quite similar to the rule that a person cannot come into equity with unclean hands and seek justice. However, as stated by our Supreme Court in *Shadden* v. *Zimmerlee,* 401 Ill. 118, 128, 81 N. E. 2d 477, 482 (1948):

> ". . . In *Pitzele* v. *Cohn,* 217 Ill. 30, we stated 'the wrongdoing which will defeat a recovery on the ground that a litigant does not come into a court of equity with clean hands must be in regard to the matter in litigation, and does not apply to the misconduct of the complainant in other matters not immediately connected with the the pending litigation.' . . ."

In the instant case, the defendant's pari delicto defense is based upon events leading up to the marriage ceremony in 1949, such as the false affidavits submitted by both parties for the marriage license. Such a defense tends to overlook the fact that during the intervening eight years before the gift in controversy occurred, the parties cohabited as husband and wife. Regarding the gift itself, which is the matter in litigation, there is no evidence that the plaintiff was guilty of unclean hands in that transaction. He did not execute the gift to unjustly evade creditors or taxes or attempt to use the transaction for any other unjust purpose. Any wrongdoing by the parties occurred eight years prior to this gift. The decree adopted the master's report which stated that the in pari delicto defense was not applicable to this case. This was proper within the facts and circumstances of this case.

Secondly, the defendant asserts that the master engaged in certain improper and prejudicial conduct which denied her a fair and impartial trial. Specifically, it is alleged this occurred when the master heard the greater portion of the evidence and concluded the hearings at a time when Pearl Kozak was trying to find a lawyer, but was without representation, causing her to proceed pro se. It is the

defendant's contention that the master should have refused to proceed wtih the hearing until she had obtained a lawyer. Such an argument tends to overlook the fact that this matter had been pending in the courts for almost three years. Furthermore, the record shows that in the instant case the defendant was represented by or had consulted with eight different sets of attorneys. The cause had been continued for a month prior to the final days of hearings so as to enable defendant to secure counsel. She contacted one firm but they withdrew without entering an appearance. On the day in question, the defendant appeared and blamed the opposing lawyers for her predicament, which was vigorously denied. She then proceeded to represent herself. Hence, the master was in a position where the litigation was proceeding very slowly and there was nothing indicating that the defendant was about to gain legal representation in the future. She had been given a month to retain an attorney but her efforts had failed. To require the master to delay the proceedings further until the defendant retained counsel, which was a total uncertainty, would be to give the defendant an advantage which is not extended to other litigants.

It is also asserted that the master committed prejudicial error when he said to the defendant during the final hearings, "You are going to lose the case better than a lawyer could." The defendant argues that such a remark showed that the master had prejudged the case and was going to rule against her, although all the evidence had not been submitted to him. Aside from the fact that it is difficult to perceive how one remark by the master in a transcript of proceedings encompassing close to 350 pages could be prejudicial error in itself, the record shows that this remark is taken out of context. It occurred when defendant was cross-examining plaintiff and was inquiring into a collateral matter, namely, the manner in which plaintiff's

older sisters had interfered with their relationship. The master interrupted to state that the inquiry was beyond the realm of materiality. When the defendant objected, the master stated that she was a better lawyer than that and that she was doing very well. When defendant replied further, the master uttered the statement now under review. This statement by the master was innocently made near the end of a trying fourth session of hearings held in two days. The contention is without merit.

The defendant also contends that certain portions of the decree, material to this appeal, are invalid as they are contrary to the manifest weight of the evidence. Hence, the defenadnt requests this court to review and evaluate the evidence which was presented before the master. Appellate tribunals so proceed if objections are filed to the master's report and if overruled, exceptions are filed before the trial court prior to a hearing on the contents of the decree. Such a procedure narrows the issues on appeal. In the instant case, the defendant failed to file objections before the master, or exceptions before the chancellor. Accordingly, this court finds that in this case the proper rule to follow is the one which states that the master's findings of fact are conclusive as against a party who has the right, but does not object in apt time to the master's report by filing objections before the master and if overruled, by filing exceptions before the chancellor prior to the entry of the decree. See *Matthews* v. *Whitehorn,* 220 Ill. 36, 77 N. E. 89 (1906) and *Postel* v. *Hagist,* 251 Ill. App. 454 (1928).

The defendant attempts to excuse her failure to file objections before the master by urging that the master failed to explain the necessity for so doing in his notice to her. In the case of *Matthews* v. *Whitehorn, supra,* this contention was answered adversely to the defendant. Our Supreme Court there held that if the defendant did not

know what method to follow to protect herself, the master was not responsible. In that case the defendant was in fact proceeding *pro se* at that stage of the proceedings because her attorney of record had not appeared before the master during the hearings, and her special solicitor, who had so appeared, had withdrawn after the hearings and before the report was issued. If the master cannot be held responsible for not telling a defendant, in effect appearing *pro se,* the procedure to follow to protect herself, neither can be be held responsible for failing to tell her the necessity for so acting. In the instant case the master did advise the defendant that the rules of court require that any litigant objecting to any of the findings or conclusions of the master's report is required to file written objections with the master. More cannot be reasonably expected of any master.

The defendant also attempts to excuse her failure to file objections to the master's report by contending that the master did not indicate in his notice that his attached report was tentative or only a proposed report. However, it is undisputed that the master gave the defendant proper notice regarding the time, place, and deadline for the filing of any obejctions to his report. The defendant did not have an attorney at the time representing her, but such a communication from the master is sufficient to put a reasonable person on notice that the master's attached report was not yet final but was tentative.

The defendant also contends that the trial court erred by arbitrarily refusing to vacate the final decree and by arbitrarily refusing to modify an earlier order requiring the defendant to deposit 34% of her 50% share in joint tenancy assets as a prior condition to the lower court's vacating of the final decree thereby allowing the defendant to file exceptions in lieu of objections to the master's report.

The record shows that on December 9, 1966, within a week after the decree was entered, the defendant filed a verified petition alleging that on December 3, 1966, she received in the mail a notice mailed by counsel for plaintiff on November 29, 1966, and stating that on December 2, 1966, his counsel would appear and present a Decree in this cause. Furthermore, she alleged she first learned on December 5, 1966, that a decree had been entered against her on December 5, 1966, that a decree had been entered against her on December 2, 1966, and she had now retained counsel to represent her interests. Her prayer for relief asked for an order vacating the earlier decree upon "such condtitions as the Court may consider fair and equitable" and for leave to allow her to file exceptions to the master's report in lieu of objections.

Three days later, December 12, 1966, the court entered its order listing the conditions upon which it would vacate its earlier decree, which conditions included the one that defendant must deposit 34% of her 50% interest in joint tenancy assets within twenty days from date of the order. Some three weeks later, January 3, 1967, defendant filed her verified petition praying for a modification of the 34% deposit condition and asking that she would not be required to make this deposit. This petition was denied on January 13, 1967 and defendant was given about two weeks to comply with the deposit conditions. A month later defendant's new counsel informed the court that she would not comply with the 34% deposit requirement leading the court to enter an order denying the motion of the defendant to vacate the earlier decree.

On appeal, defendant urges these conditions were arbitrary and not equitable as she could not support herself on the assets which she would be allowed to retain. Such a contention overlooks the point that before plaintiff filed his complaint in this cause, defendant had taken possession of

all the assets and had retained possession for almost three years until after the decree was entered. Since it is admitted by both sides that the plaintiff also sought leave to file exceptions in lieu of objections regarding the decision as to Count I of the complaint upon learning of defendant's petition, it is reasonable to conclude that the chancellor decided that defendant should make this deposit so as to obviate the necessity of future enforcement orders in case the terms of the decree should be altered concerning Count I of the complaint.

Plaintiff had argued that the joint tenancy assets should be severed according to the proportionate contributions of both parties and there was evidence that this would be a 84%-16% relationship, with plaintiff's share being the former figure. Since it appeared that both parties were now seeking to question the entire decree as both sought to file exceptions in lieu of objections, the conditions imposed by the chancellor were equitable. The defendant had possession of all the assets. The plaintiff had possession of none. The chancellor used the proportionate contributions figures provided the master during the hearings. These were approximate calculations, but were the only concrete figures available. It must not be overlooked that even if these substantial assets were to be deposited with the court, the interest and dividends on them would continue to be paid to the parties of record, plaintiff and defendant. This, too, would be a substantial sum. The conditions specified by the court were equitable within the facts of this case.

The defendant also argues that the decree should have been vacated because she did not receive notice of the plaintiff's intention to obtain a decree until the day after it was rendered. However, plaintiff's notice of motion specifying entry of the decree in question is included in the record. It contains a certificate of attorney signed by one person, an affidavit of service signed by another, and an acknowledg-

ment by a notary public, indicating that the notice was mailed to the defendant and to the master, three days before the decree was entered. The defendant offers nothing to explain why the notice was not received allegedly until after the decree had been entered. The decree would have been vacated if the defendant had complied with the chancellor's equitable conditions, which she herself had sought.

This court has examined the defendant's other contentions and the authorities cited in support thereof. We find them to be nonpersuasive within the facts of this case.

The decree and orders of the trial court are affirmed.

DECREE AND ORDERS AFFIRMED.

BURKE, *P. J.*, and MCNAMARA, *J.*, concur.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss.
SUPREME COURT. }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eleventh day of November in the year of our Lord, one thousand nine hundred and sixty-eight, within and for the State of Illinois.

Present:

Roy J. Solfisburg, Jr., Chief Justice
Justice Walter V. Schaefer
Justice Byron O. House
Justice Thomas E. Kluczynski
Justice Ray I. Klingbiel
Justice Robert C. Underwood
Justice Daniel P. Ward

William G. Clark, Attorney General
Robert G. Miley, Marshal
Attest: Cleli L. Woods, Clerk

Be It Remembered, that, to-wit: on the 20th day of November 1968, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 41698	Morris Kozak, *Respondent.* vs. Pearl Kozak, *Petitioner.*	Petition for Leave to Appeal from Appellate Court, First District 52272.

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by him in this behalf expended, to be taxed, and that he have execution therefor.

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 12th day of December, 1968.

/s/ CLELL L. WOODS,
Clerk, Supreme Court of the State of Illinois.

(SEAL)

SUPREME COURT, U. S.

FILED

MAR 15 1965

JOHN C. DAVIS, CLERK

No. 1073

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

PEARL KOZAK,

Petitioner,

vs.

MORRIS KOZAK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The Schaffer Press, Inc.—Al Glover 3-0570

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IN THE

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PEARL KOZAK,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Because of the numerous inaccuracies and omissions contained in the Petition for a Writ of Certiorari, Respondent deems it necessary to reply to Petitioner's statement of the Questions Presented and to set forth additional pertinent facts not contained in her Statement of the Case.

QUESTIONS PRESENTED

1. Petitioner claims that the master in chancery denied her procedural due process by hearing the greater portion of the evidence and concluding the hearing at a time when she was trying to find a lawyer and was without representation. As Respondent will show, there is no support in the record for the contention that Petitioner was trying to find

a lawyer at the time of the hearing. To the contrary, the record clearly shows that she voluntarily chose to proceed without counsel.

2. Petitioner claims that the master denied her procedural due process by failing to continue the hearings until she had been given a reasonable and adequate opportunity to secure an attorney. However, the record shows that Petitioner has employed or consulted with eight separate counsel, that the hearing was continued on four occasions so that she could obtain new counsel, that she made no request for a continuance to the master on September 22, or 23, 1966 and that she stated to the supervising trial court on September 20, 1966 that she proposed to try the case herself.

3. Petitioner also claims that the master denied her procedural due process by stating that she was going to lose the case better than a lawyer could. As the Illinois Appellate Court pointed out, that statement was obviously an innocent and jocular remark and Petitioner's attempt to take it out of context and ascribe substance to it is absolutely without foundation. Furthermore, such a contention pointedly ignores the fact that, as Petitioner admitted in her Brief before the Illinois Appellate Court (pp. 2, 63), the master's ruling on Count I of the two-count complaint was favorable to her and against Respondent.

4. Petitioner's final contention that the master denied her procedural due process by failing to use the precise words "proposed" or "tentative" when he sent her a copy of his report and gave her notice of the time within which she could file objections is raised for the first time before this Court and is, therefore, not timely. Moreover, the proposition completely ignores the clear language contained in the notice and suggests a duty upon the master

which cannot possibly be supported either by reference to Illinois law or under any constitutional theory.

STATEMENT OF THE CASE

Petitioner is a former school teacher and an intelligent, well educated, articulate woman. (M. Tr. 52, R. C129, Petitioner's Illinois Appellate Court Brief, p. 31) From the commencement of this lawsuit to and including the filing of her Petition for Certiorari in this Court she has been represented by or consulted with no less than eight separate counsel. Six of these counsel appeared of record on her behalf during some part of the proceeding. (R C121-131)

The greater portion of this case was heard by the master on September 22 and September 23, 1966. On four separate occasions prior to September 22, 1966, the case had been continued by the master for the specific purpose of accommodating Petitioner's desires to discharge counsel. (R. C122, 123; M. Tr. 80) On September 20, 1966, the case appeared on the progress call of the supervising trial court. Petitioner herself answered the call. At that time, knowing of the September 22 setting before the master, she stated in open court that she proposed to try the case herself because she "could not trust lawyers". (R. C124) On September 22, 1966, when the case proceeded before the master, Petitioner did not request a continuance.

On October 11, 1966, Respondent's counsel sent Petitioner a copy of his memorandum stating Respondent's position, attaching thereto copies of several memoranda of authorities, all of which were filed with the master. Petitioner did not reply. (R. C125) On November 10, 1966, the master served copies of his report upon all parties along with the following notice:

> "PLEASE TAKE NOTICE that I have prepared my report in the above cause, and copies thereof are appended hereto and served upon you. *The rules of court require that any litigant objecting to any of the findings or conclusions of this report is required to file written objections with the master. Therefore, all of you are hereby notified that objections, if any, to this report are to be filed with the undersigned master in chancery until and including Tuesday, November 22, 1966,* in the office of the master, Room 1800, 33 North LaSalle Street, Chicago." (R. C94, emphasis supplied)

Petitioner, who does not deny she received the report and notice, filed no objections. Under those circumstances, as the Appellate Court held, the report is conclusive under Illinois law, *Matthews* v. *Whitethorn,* 220 Ill. 37, 77 N.E. 89 (1906).

The master's report specifically states that ". . . defendant [Petitioner] persisted in handling the cause before the master without the assistance of an attorney." (R. C74-75) It is also worthy to note the master's specific admonition to Petitioner during the course of the hearing that she should have an attorney (M. Tr. 176) and his comment that he was giving Petitioner a liberal interpretation of the rules of evidence. (M. Tr. 157)

On November 29, 1966, Respondent's counsel mailed a notice to Petitioner that he would appear on December 2 and present a proposed decree to the trial court. Petitioner did not appear and the decree was entered on that date. (R. C100) The decree, adopting the master's report, found in favor of Petitioner as to Count I of the two-count complaint. (R. C100-110) On December 9, 1966 Petitioner had retained counsel and filed a petition, *verified by her on December 6, 1966,* (and thus obviously prepared by counsel on or before that date) in which she represented *inter alia* that she had first learned of the entry of the decree on

December 5, 1966. In that petition, she requested the trial court to vacate the decree *"upon such conditions as the Court may consider fair and equitable"* and to grant her leave to file exceptions to the master's report in lieu of objections. (R. C112, 113, Emphasis Supplied) That verified petition makes no allegation whatsoever concerning the master's conduct of the hearing or to the effect that Petitioner was denied the right to counsel and forced to try the case herself.

The trial court did not initially deny to petition to vacate the decree. In fact, it specifically ordered that the decree would be vacated and that objections could be filed if Petitioner complied with the conditions which the trial court set. (R. C119) But instead of complying with the very order she herself had sought, Petitioner asked the trial court to modify the conditions. (R. C138-141) When the trial court would not, and after two extensions of time to comply were granted (R. C165, 169), she refused to comply with the conditions. The trial court, specifically finding that she had refused to comply, denied the petition on February 16, 1967. (R. C185) Petitioner calls this portion of the case below a mere "controversy over . . . conditions". (Petition, p. 7) However, it is most important to note that she was able to obtain counsel *one day after she learned that the decree had been entered,* that she remained represented continuously thereafter, and that, despite her counsel's representation to the trial court that she would comply with the conditions (R. P. January 12, 1967, pp. 22, 23, 24), she refused to comply. (R. P. February 16, 1967, pp. 10-11) The Illinois Appellate Court specifically held that the conditions were equitable. (Petition, p. 27)

Respondent must also comment on Petitioner's inuendoes which, while not reaching the status of accusations, imply that Respondent's counsel "interfered" with Petitioner's "right" to adequate defense. (Petition, p. 5, 14) The record clearly shows the absolute lack of foundation in such a charge and we believe it a gross insult not only to counsel but to this Court that such inuendoes, completely unsupported by fact, should be contained in a Petition before the highest Court in the land.

Finally, Petitioner's Statement of Facts does not disclose that, after Leave to Appeal was denied by the Illinois Supreme Court on November 20, 1968, she filed a motion before the Honorable Walter V. Schaefer, a Justice of that Court, seeking a stay of mandate on the ground of her proposed Petition to this Court. That motion was denied on December 11, 1968. (Appendix; pp. 1a, 2a)

ARGUMENT

Respondent submits that examination of the record and the law discloses, without question, that no federal question of substance is involved in this case and that there is no basis upon which this Court's discretionary power to grant certiorari might be invoked.

The basic contention of the Petition for Certiorari is that Petitioner was somehow denied the right to counsel. The foundation upon which this claim is built is the assertion that Petitioner was unsuccessfully trying, at various pertinent times, to find an attorney. Yet both the record and the Petition as well are *absolutely silent* as to what efforts she made, what lawyers she contacted or what they said to her. All that appears is that eight separate counsel *were* involved in her behalf and that the master granted her four continuances to obtain new counsel. Certainly, these facts, coupled with Petitioner's statement to the trial court two days before the hearing that she proposed to try the case herself, the absence of a request that the master continue the hearing, her failure to respond to the statement of Respondent's position, to the master's notice calling for objections or to the notice of presentment of the decree, her *immediate* retention of counsel upon entry of the decree and her refusal to comply with the trial court's conditions at a time when she was represented, belie a claim that Petitioner was "denied" the right to counsel. Indeed, it is clear from the record that Petitioner could have obtained counsel any time she so desired, was given more than adequate opportunity to do so, and that she deliberately did not secure counsel until after the decree had been entered. No other conclusion can be drawn but

that Petitioner consciously chose to try the case herself. Indeed, the basic absurdity of Petitioner's position becomes evident when one examines page 11 of her Petition where it is stated: "It is not Petitioner's contention that the Master should have refused to proceed with the hearing until she had obtained a lawyer." However, at page 12, Petitioner states that "[the master] should have refused to complete the hearings until Petitioner had been given an adequate and reasonable opportunity to secure a new lawyer". Aside from the most basic inconsistency of these propositions, it is clear that they are not grounded in fact. As the Illinois Appellate Court stated:

> "She had been given a month to retain an attorney but her efforts had failed. To require the master to delay the proceedings further until the defendant retained counsel, which was a total uncertainty, would be to give the defendant an advantage which is not extended to other litigants." (Petition p. 23)

Even if it might be said that the record so much as suggested a denial of Petitioner's right to counsel, it is clear that any claim of alleged constitutional violation has been waived. No constitutional questions were raised in the petition to vacate the decree or at any time during the post-decretal proceedings. During this entire period of time, Petitioner was represented by counsel. After the petition to vacate the decree was denied, Petitioner took appeal to the Illinois Appellate Court. Only after that Court had affirmed the decree did she unsuccessfully seek leave to appeal to the Illinois Supreme Court and raise claims of a constitutional nature. It is basic that constitutional questions must be raised at the earliest opportunity or else they are waived. *Shepard* v. *Baron,* 194 U.S. 553, 48 L. Ed. 1115 (1904), *Johnson* v. *United States,* 318 U.S. 189, 87 L. Ed. 704

(1943), *Chicago Sandoval Coal Co.* v. *Industrial Commission*, 301 Ill. 389, 391-2 (1922), *Village of Riverside* v. *Kuhne*, 397 Ill. 108, 110-11 (1947). In fact, it has been specifically held that an appeal to the Illinois Appellate Court, rather than a direct presentation of constitutional questions to the Illinois Supreme Court, is a waiver of all such claims. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Company* v. *City of Chicago*, 242 Ill. 178, 185 (1909), *McDonald* v. *City of Spring Valley*, 285 Ill. 52, 55 (1918). Of course, this Court will not consider an alleged infringement of constitutional rights not raised in the state court, *Young* v. *Masci*, 289 U. S. 253, 77 L. Ed. 1158 (1933), and Respondent submits that the so-called constitutional questions were not properly raised in the state court, that they have been waived by Petitioner and that they are not properly before this Court.

Even were it to be assumed, *arguendo*, that the record supported Petitioner's claim that she was trying to find an attorney at the time of the master's hearing and was denied a continuance to obtain counsel, and that a constitutional question was properly before this Court, it is quite clear that no federal question of substance has been raised in any event. The very cases cited by Petitioner are clear support for this proposition. Thus, in *Crooker* v. *California*, 357 U. S. 433, 2 L. Ed. 2d 1448 (1958), this Court found *no* denial of due process in the admission of a confession signed by petitioner after his request to obtain counsel had been refused. In reaching that result, this Court stressed the intelligence, age and education of the Petitioner, a 31 year old college graduate with one year of law school, and his awareness of the right to remain silent.

In *Chandler* v. *Fretag*, 348 U. S. 3, 99 L. Ed. 4 (1954), this Court found a denial of due process where petitioner,

a negro of little education, on trial for a breaking and entering charge to which he had entered a guilty plea, was suddenly charged as an habitual criminal, a charge carrying a penalty of life imprisonment. The charge was made without prior notice and petitioner's request for a continuance to obtain counsel was summarily denied.

In *Pennsylvania ex rel Herman* v. *Clandy,* 350 U. S. 116, 100 L. Ed. 126 (1956), this Court ruled that a hearing should be granted on a petition for Habeas Corpus which alleged that petitioner, 21 years old with only six years of formal education, had been held incommunicado for three days, that he and his family had been threatened with physical harm and that, as a result of all of this, he signed a confession covering 30 separate charges without being informed of the nature of the charges, the amount of the possible sentence or that he had a right to counsel.

In re Oliver, 33 U.S. 257, 92 L. Ed. 682 (1948) involved a man, who, while testifying before a "grand jury" consisting only of a state court judge, was suddenly charged with contempt, immediately convicted and sentenced to jail. The charge, "trial" and conviction were held in secret and petitioner had no opportunity to counsel or to prepare a defense. The basis for the contempt conviction was that petitioner's testimony conflicted with that of a prior witness who had testified in secret and without the presence or knowledge of petitioner and the "belief" of the judge and his advisors that petitioner was not telling the truth. This Court held that due process had been violated.

Ex parte Chin Loy You, 223 Fed. 833 (D. Mass. 1915) involved an alien whose deportation had been ordered on the basis of testimony taken at a completely separate proceeding outside the presence of the alien or any representative on his behalf and testimony taken at "his" hearing to

which his counsel was refused admission, despite a specific request. The attorney was also denied the right to communicate with his client until after the hearing had been completed. Due process was held to have been violated.

In *United States ex rel Castro-Louzan* v. *Zimmerman,* 94 F. Supp. 22 (D. Pa., 1950) an alien, unable to speak English, without money and without any acquaintances in the city, was ordered deported following a hearing at which he was not represented by counsel. It appeared that he did have a substantial defense to the deportation. The court held that, under those circumstances, the authorities' granting of 48 hours to obtain counsel at his own expense and without any assistance was insufficient and that the alien had been denied due process.

Roux v. *Commissioner of Immigration,* 203 Fed. 413 (9th Cir., 1913) held that petitioner, an alien who had been ordered deported, was denied due process where the authorities, while telling her that she could have counsel, also told her that the case against her was weak and that counsel was unnecessary. The alien was not represented at the hearing and the court reasoned that the authorities had, in effect, overpursuaded, induced and unduly influenced her not to employ counsel.

In *Hyun* v. *Landon,* 219 F. 2d 404 (9th Cir., 1955), petitioner's deportation hearing included the taking of depositions in Hawaii. Notice of the depositions was given and petitioner's counsel was informed that petitioner could be present or represented and could submit interrogatories to the witnesses. The court *rejected* petitioner's argument that due process had been violated because he could not afford to go or to send his attorney and that the govern-

ment should have either brought the witnesses to petitioner or paid for transportation and noted that, because deportation hearings are *civil* in nature, there is no absolute right to be confronted by adverse witnesses.

Finally, *Brinkerhoff-Fariz Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 74 L. Ed. 1107 (1930), a taxation case, held merely that due process could be violated through state judicial action as well as through the legislative, executive or administrative branches. The facts are not even remotely connected with those at bar.

It is obvious that not one of the elements involved in those cases where constitutional rights were held to have been violated are present here. Petitioner is not an ill-educated or ignorant person. She reads, writes and speaks perfect English and even a cursory review of the record discloses her high degree of intelligence and strong will. As this Court held in *Crooker* v. *California,* 357 U.S. 433, 2 L. Ed. 2d 1448 (1958), these are most important factors in determining whether due process has been violated. Certainly, Petitioner makes no claim that she was held incommunicado, subject to physical threats or denied the right to confront witnesses against her. Respondent submits that if this Court has never before determined a claim of the sort here alleged, it is only because it is patently absurd. Certainly, no federal question of any substance at all is presented.

Petitioner's subordinate contention that the master denied her due process by commenting that she was going to lose the case better than a lawyer could is pursued with befittingly little vigor. Indeed it is difficult to believe that Petitioner is serious in this allegation. As the Illinois Appellate Court pointed out, the remark was innocently

made near the end of the hearing and Petitioner's attempt to ascribe substance to one remark in a transcript of close to 350 pages borders upon the absurd. (Petition, pp. 23-4) Moreover, the Master's ruling on Count I of the Complaint was favorable to Petitioner. It is indeed difficult to perceive how due process was violated here.

Finally, Respondent must comment on Petitioner's proposition that due process was violated because the master's notice did not use the precise words "proposed" or "tentative" in describing the attached report. As indicated above, this proposition was not advanced before any of the Illinois state courts and, consequently, is clearly barred by *Young* v. *Masci*, 289 U.S. 253, 77 L.Ed. 1158 (1933). Furthermore, the Illinois court rule and case cited in support of this contention cannot possibly be read to require the use of these precise words. In view of the clear language contained in the master's notice concerning objections, it is indeed difficult to perceive what else the report might have been if not "proposed" or "tentative". Moreover, Petitioner's argument concerning this point appears circular to say the least. If, as she contends without support, she was unable to obtain counsel at this point in the case, it is difficult to understand how the specific labeling of the report as "proposed" or "tentative" would have been of any assistance. If, on the other hand, Petitioner means that, had the report been so denominated, she *would* have then obtained counsel, she has indeed tacitly admitted, as the record shows, that she could have obtained counsel any time she chose.

CONCLUSION

Respondent respectfully submits that no grounds for Certiorari exist in this cause, that the opinion of the Illinois Appellate Court and the ruling of Illinois Supreme Court are correct and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

NO. 41698

IN THE SUPREME COURT OF ILLINOIS - MAY TERM, A. D. 1968

MORRIS KOZAK,

Plaintiff - Appellee,

vs.

PEARL KOZAK,

Defendant - Appellant.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

HONORABLE JUSTICES Lyons, Burke and McNamara Presiding.

MOTION TO STAY MANDATE

Now comes the Defendant - Appellant, Pearl Kozak, by Gromer, Abbott & Wittenstrom, her attorneys, pursuant to Supreme Court Rule 368(c), and moves the Court as follows:

1. That the Court enter an Order staying the mandate of the Supreme Court of Illinois and of the Appellate Court of Illinois, First District, in this cause for the reason that Defendant - Appellant, Pearl Kozak, intends to seek review by the Supreme Court of the United States.

2. Petition for leave to appeal was denied by the Illinois Supreme Court in this cause as of November 20, 1968. Unless stayed, the mandate of this Court may issue by December 11, 1968.

3. Defendant - Appellant, Pearl Kozak, intends to file a Petition for a Writ of Certiorari to the Supreme Court of the United States on or before February 20, 1969.

Attorneys for Pearl Kozak,
Defendant - Appellant

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MORRIS KOZAK,

Plaintiff - Appellee,

vs.

PEARL KOZAK,

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APPEAL FROM THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

HONORABLE JUSTICES Lyons, Burke and McNamara Presiding

ORDER

This cause coming on to be heard now upon the Motion to Stay Mandate filed this date by Defendant - Appellant, Pearl Kozak, due notice having been given to the attorneys of record for Plaintiff - Appellee, Morris Koza, and the court being fully advised in the premises,

IT IS THEREFORE ORDERED by this Court that the motion is denied. ~~mandate of this Court and of the Appellate Court of Illinois, First District, in this cause be, and it hereby is, stayed until final disposition of this cause by the Supreme Court of the United States.~~

Dated: December 10, 1968.

ENTER: Walter V. Schaefer
Justice of the Supreme Court of Illinois

FILED

DEC 11 1968